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## COMMENTS

### GENERAL PRINCIPLES AND CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) – UNIFORMITY UNDER AN INTERPRETATION UMBRELLA?

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*Globalization and digitalization of international sales creates needs to harmonize rules of international commercial contracts. The question is whether the harmonization should be done by binding rules or using soft law tools or through digitalization. In this article I argue on favor of harmonization through international contracts law rules' international interpretation.*

*The international interpretation principles used in this article are found from on Art. 7(1) of the Convention on Contracts for the International Sale of Goods (CISG) which sets three interpretation rules: international character; promoting uniformity; and observance of good faith in international trade. These principles are not only principles of the CISG, but also principles commonly recognized in international commercial practice and also in domestic contract rules. I argue that by adopting an international interpretation umbrella – the meta-principle of international interpretation, cross-border contracts could be interpreted under the same principle no matter applicable substantial law. The meta-principle functions as an interpretation umbrella covering general principles and Articles of the CISG, general principles of international commercial contracts, Lex Mercatoria, and cross-border contract provision under national law.*

*The outcomes points out that arbitral tribunals have interpreted general principles of the CISG and Lex Mercatoria in various ways. General principles and their application in case law is analyzed in connection with the Civil Code of the Russian Federation. Tribunals found that general principles of the CISG are applicable even if the CISG is not. It follows Art.'s 7(2) logic to promote international standard to cross-border contracts where the closes connection is international commercial practice rather than any national jurisdiction.*

*Keywords: CISG; Vienna Convention; international commercial contracts; general principles; international interpretation; harmonization; uniform interpretation.*

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## Introduction

Discussion around the globalization of international sales and need to find a uniform contract law rules is nothing new under the sun. However, there is still lack of uniform rules and legal certainty when domestic courts and arbitral tribunals interpret contract clauses. However, it is necessary to continue the discussion around unification and try to find a way to interpret contract law rules through the nature of the international commercial contracts in global contract chains. In following I argue that this should, and could, be done by adopting an international interpretation umbrella – *the meta-principle of international interpretation*.

Steps towards harmonization in following are not taken by finding common binding contract law provisions but rather to establish universally recognized tools – principles – to interpret contract law rules in more predictable and uniform ways.

In this article I have taken the Civil Code of Russian Federation (hereinafter – Russian Civil Code) as an example of substantial rules interpreted in international commercial arbitration connected to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)<sup>1</sup> (hereinafter – CISG or Convention). Drafting of the Russian Civil Code was impacted by the UNIDROIT Principles for International Commercial Contracts (hereinafter – UNIDROIT Principles).<sup>2</sup> Russian Federation is also a contracting State of the CISG. Therefore it is merely easy to justify the use of general principles of the UNIDROIT Principles and the CISG to interpret cross-border contracts in connection with the Russian Civil Code.

Use of general principles as an interpretation umbrella to interpret international commercial contracts in national courts and arbitral tribunals can be justified by following four steps:

1. applicability of the CISG;
2. the CISG as a part of national jurisprudence;
3. parties' intention to act in international commercial practice; and
4. national law rules are codified to national situations and not to national contract relations.

**Scope.** The scope of this paper is to analyze general principles of international commercial law found in the CISG. My focus will be in Art. 7 of the CISG which sets the

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<sup>1</sup> Full text of the Convention is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html).

<sup>2</sup> Full text of the UNIDROIT Principles 2010 is available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

provisions of the meta-principle of international interpretation. Art. 7(1) sets rules to interpret the Convention itself and Art. 7(2) provides the CISG's gap-filling tools. In this paper my focus will be in Art. 7(2) and its gap-filling methodology. General principles are analyzed through arbitration cases connected to the Russian Civil Code.

The meta-principle of international interpretation is to be established top of the CISG's general principles and be functioning as an interpretation framework, or an umbrella, where general principles, specific provisions and substantial law rules shall be interpreted case by case in light of contracts' international character and purpose.

**Methodology.** Freedom of contract is widely recognized general principle – also under the CISG. However, my point of view in here is on interpretation rules in situation where parties have not used their freedom to opt-out from the CISG. Therefore I am leaving out the freedom of contract and focusing on situations where a national court or an arbitral tribunal faces the question on whether the CISG or substantial law will be applicable under private international law rules.

Leaving the principle of freedom of contract outside of my scope I am approaching the issue of harmonizing commercial contract law rules by using general principles common to the CISG, the UNIDROIT Principles, national laws and other sources of law in this field. In this sense I am using unification methodology trying to find uniform rules and solutions to questions arising in contracts having connection to different nationalities. In this article I am focusing only one contracting State of the CISG: the Russian Federation. However, same principles can be applied to all other contracting States of the CISG – and, as I argue, also non-contracting States of the CISG.

Idea of harmonizing rules through principles and interpretation and not through codification was found already in Roman law times. Roman law impacted to the common law, *Ius Commune*, in Europe. *Ius Commune* effected to the way different national laws were interpreted across Europe. European lawyers had the same legal education and same methodological sources which harmonized the thoughts and interpretation of European lawyers.<sup>3</sup>

First step in this article is to recognize what are general principles and what kind of general principles there exists under the CISG. Second step is to take closer look on how national law, in this case the Russian Civil Code, and sources of general principles of international commercial contracts are linked together. Does general principles of the CISG apply only when the CISG itself apply? Thirdly I will analyze selected arbitration cases from the Russian Federation on interpretation of Art. 7 of the CISG. Case law shows that interpretation of Art. 7 of the CISG lacks predictability and thus leads opposite conclusions in rather similar issues. Last step is to draw together the case law and general principles and to establish an interpretation umbrella – the meta-principle of international interpretation.

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<sup>3</sup> Pascal Pichonnaz, *Harmonization of European Private Law: What Can Roman Law Teach Us; What Can It Not?* in *Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 20 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

**Outcomes.** Outcomes of this article suggests that arbitral tribunals are interpreting international commercial contracts through international interpretation principle. However, the case law provides opposite judgements to similar cases and thus the big picture stays unpredictable and unclear. General principles are abstract and judges rather use specific rules than abstract principles. Analyzed cases presents interpretation of Art. 7(2) of the CISG in way where tribunals have been seeking other sources than just picking up the easiest way to go to national law.

General principles of the CISG and of international commercial contracts in general offers framework where to find tools for international interpretation. The toolbox is available but yet we need to figure out how to use those tools in a way that parties can benefit from better legal certainty and more predictable judgments.

### 1. Definition of General Principles

Magnus<sup>4</sup> writes that principles are basic rules where general principles are very basic rules.<sup>5</sup> General principles are more broad and abstract than principles generally. In their abstract nature general principles are something opposite to specific codified articles. Therefore general principles are not direct solution to a concrete legal issue.<sup>6</sup> To apply a general principle, abstract in its nature, to a specific legal issue the principle needs to become more concrete and specific rule.<sup>7</sup>

I refer to general principles following Magnus' definition of broad and abstract basic rules found from the provisions of the CISG. Following from the case law<sup>8</sup> there are several general principles in the CISG. Those relevant to the case law analyzed in this article are general principles of party autonomy, good faith, right to interest, and favor contractus.

The CISG creates its own specific reference to general principles in Art. 7(2).<sup>9</sup> The UNIDROIT Principles refers to general principles in similar way.<sup>10</sup> Arbitral tribunals

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<sup>4</sup> Ulrich Magnus, *Harmonization and Unification of Law by the Means of General Principles in Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 162 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

<sup>5</sup> Axel Metzger, *Allgemeine Rechtsgrundsätze in Handwörterbuch des Europäischen Privatrechts I* 33 (J. Basedow et al. (eds.), Tübingen: Mohr Siebeck, 2009).

<sup>6</sup> Magnus 2012, at 162.

<sup>7</sup> *Id.*

<sup>8</sup> UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition) (Apr. 25, 2017), available at [http://www.uncitral.org/pdf/english/clout/CISG\\_Digest\\_2016.pdf](http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf).

<sup>9</sup> Camilla Baasch Andersen, *General Principles of the CISG Generally Impenetrable?* in *Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* 13 (C.B. Andersen & U.G. Schroeter (eds.), London: Wildy, Simmonds & Hill, 2008).

<sup>10</sup> Magnus 2012, at 165.

keep referring to the UNIDROIT Principles as general principles of international contracts.<sup>11</sup>

Magnus argues that there are common guidance objective when concrete rules are not available. General principles can also be used to secure the right obligation of law in situations where strict application of specific rule would lead into injustice result.<sup>12</sup>

However, general principles in the CISG and the UNIDROIT Principles functions in different way. The general principles are guidelines for interpreting their provisions and in this character even to substitute the other way applicable national law<sup>13</sup>. Magnus claims that in situation general principles in international conventions expresses clearly their goals in the convention principles should be followed.<sup>14</sup>

Andersen asks that how uniform should the CISG's uniform interpretation be? Should uniformity vary from provision to another? There has to be at least some level of uniformity in every provision to promote the uniformity of the CISG entirely.<sup>15</sup> However, even that Art. 7(1) provides uniform application it does not lead into a duty of judges' uniform interpretation.<sup>16</sup>

### **1.1. Article 7 of the CISG**

Chapter II, Arts. 7 to 13, of the CISG sets provisions to general issues under the Convention. Art. 7, which will be the focus of this article, provides interpretation rules. Art. 7(1) sets rules to interpret the Convention itself and Art. 7(2) the CISG's gap-filling provisions. In this paper the focus will be in Art. 7(2) and its gap-filling methodology.

#### **Article 7**

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

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<sup>11</sup> Magnus 2012, at 166.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 167.

<sup>14</sup> *Id.* at 169.

<sup>15</sup> Camilla Baasch Andersen, *Uniformity and Harmonization by Case Law: The CISG and the Global Jurisconsultorium in Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 180 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

<sup>16</sup> *Id.* at 182.

Art. 7(1) determines rules for interpretation and filling gaps of the CISG. The paragraph sets out three interpretation principles:

1. international character of the CISG;
2. aim to promote uniformity in its scope; and
3. good faith in international trade.

Art. 7(2) provides gap-filling methodology for issues which are covered by the CISG but not expressly settled in its provisions. This means that if the issue falls under the scope of the CISG, and is not dealing with the validity of the contract and thus fall under Art. 4, it is covered under the CISG and thus interpretation rules of Art. 7(2) apply. Problematic within this principle is, whether the issue is covered by the CISG or not.<sup>17</sup>

Art. 7(2) includes two different principles to fill gaps:

1. general principles of the CISG; and
2. domestic law.

If there is no explicit statement in the provisions to settle the issue, the interpreter must first apply the general principles of the CISG. Only in a case where there is no general principle applicable to that specific issue, can domestic law be applied.

### **1.2. General Principles of the CISG**

In the UNCITRAL Digest of Case Law<sup>18</sup> there are several general principles courts have found from the Convention. These general principles are as follows: party autonomy; good faith; estoppel; place of payment of monetary obligations; currency of payment; burden of proof; full compensation; informality; dispatch of communications; mitigation of damages; binding usages; sett-off; right to withhold performance and the principle of simultaneous exchange of performances; right to interest; costs of one's own obligations; changed circumstances and right to renegotiate; and favor contractus.

## **2. The Principle of International Interpretation**

Art. 7 of the CISG provides two principles to fill gaps in contracts governed by the CISG. Principle to fill gaps in the CISG itself is to apply general principles of CISG. Second principle is for gaps falling outside of the CISG's scope which shall fall under applicable national law. These gap-filling principles shall be used, according to Art. 7, in the above mentioned order. First to apply general principles, and only if the general principles are not available, then applicable national law.

Art. 7(1) of the CISG sets the international character as starting point to interpret the CISG. However, it is everything else than clear how such interpretation standard actually should be used in practice. Therefore the international standard should be

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<sup>17</sup> Rolf Herber et al., *Chapter II: General Provisions in Commentary on the UN Convention on the International Sale of Goods (CISG)* 61 (P. Schlechtriem (ed.), Oxford: Clarendon Press, 1998).

<sup>18</sup> UNCITRAL Digest of Case Law, *supra* note 8.

defined as an interpretation tool. My aim is to define the standard as the international interpretation principle. Where the standard is the starting point of the CISG's interpretation, the international interpretation principle shall function as a meta-principle providing framework where general principles and specific provisions are interpreted in. The framework, or an umbrella, thus promotes uniform interpretation platform to respect contracts' cross-border nature whatever substantial rules apply.

Grounds for the international interpretation and the CISG has been taken around the issue of penalty clauses and thus I am here referring shortly on interpretation options discussed in academia on penalty clause debate. According to academics' question of penalty clauses falling under the CISG, or not, there have been three options how penalty clauses could be treated under the CISG. Graves divides these three options as follows:

1. validity of penalty clauses is falling under applicable domestic law;
2. the CISG is directly applicable to penalty clauses; and
3. penalty clauses are not directly falling under the CISG but shall be interpreted in light of the uniform approach of the CISG.<sup>19</sup>

First interpretation option is to interpret penalty clauses falling under Art. 4 of the CISG and apply national law.<sup>20</sup> Second option is the CISG's direct application. Zeller argues that the issue of penalty clauses should not be tried to solve focusing on single Articles of the CISG but to approach the issue viewing the CISG as a whole. As the general principles apply to the CISG as a whole, Zeller argues that it is not possible to exclude penalty clauses based on the lack of explicit provision if they can be seen falling under the scope of the general principles.<sup>21</sup>

Hachem argues that applicable domestic law shall be interpreted *by applying an international standard*<sup>22</sup> that would follow the principle of uniformity under Art. 7 of the CISG. The CISG Advisory Council gave its opinion regarding the issue of penalty clauses under the CISG and provided options on international interpretation and definition of international standard. The one rule of the opinion states that even the issue of penalty clauses shall fall out of the CISG should domestic law rules been interpreted through an international standard.<sup>23</sup>

<sup>19</sup> Jack Graves, *Penalty Clauses and the CISG*, 30 *Journal of Law and Commerce* 153 (2012); Touro Law Center Legal Studies Research Paper No. 14-41 (2012), at 5 (Apr. 25, 2017), also available at <http://ssrn.com/abstract=2350315>.

<sup>20</sup> Bruno Zeller, *Penalty Clauses: Are They Governed by the CISG?*, 23(1) *Pace University School of Law International Law Review Online Companion* 8 (2011) (Apr. 25, 2017), also available at <http://digitalcommons.pace.edu/pilr/vol23/iss1/1>.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Graves 2012, at 5; CISG-AC Opinion No. 10, *Agreed Sums Payable upon Breach of an Obligation in CISG Contracts*, Rapporteur: Dr. Pascal Hachem, Bär & Karrer AG, Zürich, Switzerland, adopted by the CISG-AC following its 16<sup>th</sup> meeting in Wellington, New Zealand on August 3, 2012 (Apr. 25, 2017), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html>.

<sup>23</sup> CISG-AC Opinion No. 10, *supra* note 22.



According to the CISG Advisory Committee the international standard shall be the one found from the provisions of the CISG. In other words it means reference to the general principles of the CISG which does not limit parties' freedom to agree fixed sums in general in regard to issue of penalty clauses. A validity test of the penalty clause following the international interpretation should therefore be taken under the international standards presented by the CISG. Interpreting domestic law in this view is possible as the CISG has become a part of a domestic jurisdiction when adopted. The CISG is applicable only to international sale contracts and thus it is reasonable to interpret international contracts differently than pure domestic contracts.<sup>24</sup>

### 3. The UNIDROIT Principles

The UNIDROIT Principles 1994 have been serving arbitral tribunals and national courts as a source of gap filling when international conventions or national laws are not providing an answer. However, the UNIDROIT Principles have also been used as a model law for national legislations – one of such national laws being the Russian Civil Code.<sup>25</sup>

The Russian Civil Code has taken impact from the UNIDROIT Principles and therefore it offers a good sample of national law where general principles of international commercial contracts have become part of national law and national contracts. The direct transform of the UNIDROIT Principles to the Russian Civil Code is not necessarily possible to indicate but the impact as a model law behind the Russian Civil Code is not disputed.<sup>26</sup>

### 4. International Interpretation and National Law

#### 4.1. International Character of Russian Civil Law

Art. 7, para. 1 of the Russian Civil Code: [G]enerally recognized principles and norms of international law and international treaties of the Russian Federation shall, in accordance with the Constitution of the Russian Federation, be an integral part of the legal system of the Russian Federation.

However, scholars have criticized that the above paragraph does not provide grounds for direct application of international principles as a part of national law.<sup>27</sup>

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<sup>24</sup> CISG-AC Opinion No. 10, *supra* note 22, para. 4.2.1.

<sup>25</sup> Thomas Probst, *The UNIDROIT Principles of International Commercial Contracts 1994 and 2004: A Brief Introduction with a Synoptic Overview in The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification (ISDC Colloquium – 8/9 June 2006)* 18 (E.C. Ritaine & E. Lein (eds.), Zürich: Schulthess, 2007).

<sup>26</sup> Josef Skala, *The UNIDROIT Principles of International Commercial Contracts: A Russian Perspective in The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification (ISDC Colloquium – 8/9 June 2006)* 120 (E.C. Ritaine & E. Lein (eds.), Zürich: Schulthess, 2007).

<sup>27</sup> *Id.* at 124.

Thus, even that direct transformation from international principle into a provision of national law would not be possible under Art. 7 of the Russian Civil Code it is however offering a possible way to find a solution from international principles when precise rule is not available.<sup>28</sup>

The Plenum of the Supreme Court of Russian Federation, in its Decree No. 5 of 10 October 2003, has instructed courts of general jurisdiction that such “generally recognized principles” are the “basic imperative norms of international law adopted and recognized by the international community of States as a whole, deviation from which is inadmissible” (point 1). Examples given by the Plenum include universal respect for human rights and good-faith fulfilment of international obligations... Russian doctrinal writings in many instances equate such “generally-recognized principles” to customary international law.<sup>29</sup>

Russian civil law recognizes international sources of law as a part of its legal system. International legal principles found as general principles are seen as a part of the national jurisdiction. The status of such legal principles is stated in Art. 15, part 4 of the Constitution of the Russian Federation. If there is collision between national and international principle the international principle shall prevail.<sup>30</sup>

Russia is a contracting State of the CISG which leads to a situation where general principles of the CISG are part of a national legal system and shall be interpreted in their own character and not through national law.

UNIDROIT Principles are not recognized under Art. 7 of the Russian Civil Code as conventions like the CISG are. However, UNIDROIT Principles are recognized and can be taken into account as part of commercial practice.<sup>31</sup>

One special character of the Russian Civil Code is that contracts where other party is Russian citizen, no matter which law is applicable, shall always be in written form. This rule has been taken also in the CISG.<sup>32</sup>

In the Russian Civil Code a customary commercial practice is recognized and it can be used to identify specific character of the practice concerning the contract relationship. However, the commercial practice cannot be against legal rules, so far only good faith commercial practice can be recognized as a source to interpret contracts. Commercial practice is a fast source if nothing else is found to give an answer to the issue.<sup>33</sup>

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<sup>28</sup> Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1(2) Uniform Law Review 252 (1996).

<sup>29</sup> William E. Butler, *Russian Law and Legal Institutions* 135 (London: Wildy, Simmonds & Hill, 2014).

<sup>30</sup> Vladimir Orlov, *Venäjän sopimusoikeus* 55 (Helsinki: Lakimiesliiton Kustannus, 2001).

<sup>31</sup> *Id.* at 56–57.

<sup>32</sup> *Id.* at 59.

<sup>33</sup> *Id.* at 60.

In Russia the UNIDROIT principles are used by the parties' choice of law of their contract and even if not chosen by the parties the Principles are used to resolve issues arising out of international contractual relationships<sup>34</sup>.

#### **4.2. Case Law and Customs as a Source of Law in Russia**

In this context the case law refers to an international commercial arbitration cases. The UNCITRAL Model Law on International Commercial Arbitration (1985) has been the basis for the Russian Law on International Commercial Arbitration (1993). The Model Law states that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."<sup>35</sup>

The Russian Civil Code recognizes the commercial practice in Art. 5, para. 1 as a source of law. Commercial practice can be used always when the question is arising from relationship of two or more enterprises as it is recognized as a common practice. According to Art. 5 of the Russian Civil Code customs refers to behavioral rules applied in international commerce or rules referred in some document but are not provided by legislation. Therefore customs are mainly rules under law of obligations.<sup>36</sup> Internet and databases brings judicial decisions accessible on public. This has strength the meaning of case law and its precedential value of gap filling.<sup>37</sup> However, published arbitration awards are not been seen as a precedent. Therefore an arbitration award does not have significant meaning for the Russian legal system.<sup>38</sup> But approaching the Russian legal system in international context they might have more value and they might have influence in international context.

### **5. General Principles in the CISG Case Law**

In this chapter general principles for the foundations of the meta-principle of international interpretation are found from the CISG and analyzed through arbitration cases connected to the Russian Civil Code. Arbitrators in the cases analyzed in this chapter have interpreted Art. 7 of the CISG in light of either solving the case by using general principles or finding the issue falling outside the scope of the CISG and applied substantial law. Analyzed cases are arbitration cases taking place in the

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<sup>34</sup> Skala 2007, at 128.

<sup>35</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (Apr. 25, 2017), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>36</sup> Butler 2014, at 128–129.

<sup>37</sup> *Id.* at 124.

<sup>38</sup> V.V. Veeder, 1922: *The Birth of the ICC Arbitration Clause and the Demise of the Anglo-Soviet Urquhart Concession* in *Global Reflections on International Law; Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 881–901 (G. Aksent & R.G. Briner (eds.), Paris: ICC Publishing, 2005).

Russian Federation and English translations of the cases are available at UNCITRAL's CLOUT,<sup>39</sup> CISG Database<sup>40</sup> and UNILEX<sup>41</sup> databases.

**5.1. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, June 5, 1997, No. 229/1996**

The contract included a penalty payment term in case of a delay of the payment. Party obliged to pay the penalty according to the contract challenged the clause based on the agreed sum was unfair. The CISG was applicable to the dispute but it does not cover the question of validity of a penalty clause. Therefore the arbitral tribunal applied other rules for the issue. The arbitral tribunal decided to apply the UNIDROIT Principles to fill the gap of the CISG instead of applying domestic law.<sup>42</sup>

The Court found that the application of the UNIDROIT Principles is possible according the Preamble stating that *they may be used to interpret and supplement international uniform law instruments*. Second reason to apply the Principles was that they are based on common practices of international commerce which the Court though the parties knew or *ought to have known*. As reflecting the usages of international trade the Court held that the Principles can be applied under Art. 9(2) of the CISG. As a result the Court found that the penalty fee was excessive under Art. 7.4.13(2) of the UNIDROIT Principles.<sup>43</sup>

Common interpretation of the CISG is that penalty clauses are not explicitly covered and thus penalty clauses falls under Art. 4 of the CISG which determines questions of a validity falling under the applicable domestic law. However, this interpretation has been lately challenged. It is argued that Art. 74 of the CISG would actually cover fixed sums and therefore Art. 4 of the CISG would not be applicable. Thus penalty clauses would be directly covered under CISG.<sup>44</sup>

The Court followed the common interpretation that penalty clauses are falling outside of the scope of the Convention. The Court found question of validity of penalty clauses falling outside of the CISG but instead of applying substantial law the Court decided to apply the other source of general principles of international commercial contracts. Therefore I could argue that the Court actually applied the principle of

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<sup>39</sup> The UNCITRAL Secretariat's database of information on court decisions and arbitral awards relating to the CISG (Apr. 25, 2017), available at [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

<sup>40</sup> CISG Database of Pace Law and Institute of International Commercial Law (IICL). CISG Database is to promote cross-border trade and the rule of law and it includes the CISG case law, Treaty text and legislative history and guidelines to apply the CISG (Apr. 25, 2017), available at <http://iicl.law.pace.edu/cisg/cisg>.

<sup>41</sup> Database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the CISG (Apr. 25, 2017), available at <http://www.unilex.info>.

<sup>42</sup> English translation available at <http://cisgw3.law.pace.edu/cases/970605r1.html>.

<sup>43</sup> Skala 2007, at 129.

<sup>44</sup> Graves 2012, at 3–6.

Art. 7(2) of the CISG that issues *not expressly settled in it are to be settled in conformity with general principles on which it is based* instead of finding the applicable general principle from the CISG the Court applied general principles of the UNIDROIT Principles.

**5.2. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, April 27, 2005, No. 5/2004**

The Court held that the principle of good faith and fair dealing is a fundamental principle of mandatory nature in international commercial relations, as determined in Art. 1.7 of the UNIDROIT Principles. In the fundamental and mandatory nature the principle was extended to cover the parties' contractual relations not only for the contract but also to the preliminary state of concluding the contract and also for the contractual relations at the stage where conflict took place. The Court held that the fundamental character of the principle covers the whole pre-arbitral stage and not only the contract itself.<sup>45</sup>

However, as the conflict between parties was from the validity of a penalty clause, the Court held that the CISG is not applicable. Thus the Court found that the clause shall be interpreted under a substantial law of the contract. The question of a penalty clause was to be decided under the substantial law, which in this case was the Russian Federation law and Art. 333 of the Russian Civil Code.

**5.3. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, December 19, 2008, No. 14/2008**

The Court found that the CISG was applicable to the dispute. Issues not covered under the CISG falls under Art. 1211 of the Russian Civil Code determining the applicable law of the country of the seller. The Court stated that the question of penalty clause did not fall under the application of the CISG and therefore applied Croatian law. Preliminary work of the CISG rejects penalty clauses to fall under Art. 7(2). However, analogy for similar issues which are not rejected by the preliminary work for falling under the CISG could be made. Issues not expressly settled in but falling under the general principles shall lead to application of the CISG.<sup>46</sup>

**5.4. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, February 8, 2008**

The parties agreed the Court's proposal to apply the general standards and rules of international contracts as a governing law of the contract. Therefore *Lex Mercatoria* to cover the contract and thus the CISG was not directly applicable. However, the CISG and the UNIDROIT Principles apply indirectly via principles and practices expressing international commercial customs. The Court also held that the general

<sup>45</sup> English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at <http://www.unilex.info/case.cfm?id=1201>.

<sup>46</sup> English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at <http://www.unilex.info/case.cfm?id=1493>.

principles can be found from various rules of domestic law applicable generally to international contracts under parties' choice of law.<sup>47</sup>

Even that the CISG was not applicable as a governing law of the contract it was applicable through its general principles as part of *Lex Mercatoria*. I argue that following this path the international interpretation principle shall be similarly applicable to all international commercial contracts even if the CISG itself would not directly apply.

### **5.5. Court of Arbitration of the International Chamber of Commerce, February 1999, No. 9474**

The Court of Arbitration of the ICC proposed that the general standards and rules of international contracts shall apply in this case. The Court stated that the CISG is generally agreed to address universal principles on international contracts even if the contract is not covered by the CISG itself. Parties had not choose the CISG as the governing law of the contract the CISG can be used as a source of standards and rules of international contracts. Other references for such standards and rules were found from the Principles of European Contract Law and the UNIDROIT Principles. The Court underlined that the standards and rules found from above mentioned sources apply through the intention of the parties. The general standards and rules of international contracts are not, however, only found from international conventions but also from different national laws chosen by parties for such circumstances. The Court stated that the CISG does not directly apply to the issue and thus the issue shall be under an assessment of a broad perspective of international contracts. The principle applicable in the case, vendor cannot rely on a buyer's failure to inspect the goods and to give timely notice of defects, is recognized in international contracts and found in Art. 40 of the CISG.<sup>48</sup>

### **5.6. Federal Arbitration Court of the Volga-Vyatka Area, April 2, 2007, No. A43-21560/2004-27-724**

In this case the Court of Appeal held that the lower court had apply incorrectly the national law on issue what was actually – following the Court of Appeal – governed under the CISG. The responded claimed that the CISG should apply through national law. The CISG was found applicable on the interest on the agreed sum party fails to pay. The Court held that there was no question of damages or penalty and thus the CISG apply and national law principle reducing the payable sum shall not be applied. Thus it was in question on how the CISG defines interest which is not a penalty or constitutes damages. As the CISG covers the question of interest there was no need for cap filling by national law under Art. 7(2) of the CISG.<sup>49</sup>

<sup>47</sup> English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at <http://www.unilex.info/case.cfm?id=1497>.

<sup>48</sup> English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at <http://www.unilex.info/case.cfm?id=716>.

<sup>49</sup> English summary of the case is found in the CLOUT database, CLOUT case 1111 (Apr. 25, 2017), available at [http://www.uncitral.org/clout/clout/data/rus/clout\\_case\\_1111\\_leg-2882.html](http://www.uncitral.org/clout/clout/data/rus/clout_case_1111_leg-2882.html).

**5.7. Tenth Arbitration Appeal Court, Moscow, April 14, 2012, No. A41-20318/11**

The question was on Art. 7(2) of the CISG and issues falling outside of the CISG's scope. The Court held that the CISG does not specify the amount of interest payable if the buyer does not pay the agreed price. The CISG was not applicable under Art. 7(2) as the Convention's possibility of recovering interest was not clear enough to specify the interest under the CISG. Substantive law shall apply. The CISG stays silent also on the method how the interest shall be calculated. Therefore the Court held that national law shall apply on the question how to determine the interest.<sup>50</sup>

**5.8. Outcomes of the Case Law**

The three cases dealing with the issue of penalty clauses all held that the CISG does not apply to penalty clauses. However, the one tribunal found that in a nature of the contract the issue shall be solved under the common practices of international sale and applied the UNIDROIT Principles instead of national law. This follows the idea of international interpretation where the issue is from cross-border contract and thus the solution should follow the same cross-border character. One penalty clause case express the analogical interpretation of similar issues. Therefore if issue of penalty clauses would not be expressly left outside of the CISG they should be falling under Art. 7(2) and general principles of the CISG.

In the cases on the issue if the CISG covers an interest or not and are such provisions clear enough. In one case the tribunal found the CISG applicable but in another the tribunal stated that even interests falls under the CISG the provision is not clear enough to specify interest under the CISG. I argue that here the tribunal made an error and applied national law instead of the CISG. When the CISG was applicable the first gap-filling principle of Art. 7(2) states that if the issue is *not expressly settled* in it shall be *settled in conformity with the general principles*. The second gap-filling principle of Art. 7(2) states that *in the absence of such principles* the issue shall be *settled in conformity with the law applicable*. The reason the CISG was not found applicable was lack of specific provisions to calculate the payable sum. I argue that even that there were not specific provisions to calculate the exact sum the general principles apply. And according to Art. 7(2) if there are applicable general principles the CISG shall apply over the substantial law.

There were two cases where the CISG's general principles were found applicable even the CISG itself was not. General principles apply as part of *Lex Mercatoria* and thus international interpretation principle of the CISG can be applied in similar way.

**Conclusion**

General principles are abstract and broad rules and they are not giving direct solution to specific legal issue but they can be used as a guidance to find a correct

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<sup>50</sup> English summary of the case is found in the CLOUT database, CLOUT case 1364 (Apr. 25, 2017), available at [http://www.uncitral.org/clout/clout/data/rus/clout\\_case\\_1364\\_leg\\_3130.html](http://www.uncitral.org/clout/clout/data/rus/clout_case_1364_leg_3130.html).

case by case interpretation for concrete applicable norm.<sup>51</sup> Therefore it is not easy way opt interpretation from general principles, but at the other hand, therefore it is reasonable to adopt general principles as interpretation framework.

Following the discussion of penalty clauses and the CISG there has been arguments favoring the CISG's interpretation through international standard provided in Art. 7(1) of the CISG. As the provision of international standard leaves its definition open and unclear I argue that the standard should apply as a meta-principle of international interpretation. The meta-principle works as an interpretation umbrella to cover general principles and Articles of the CISG, general principles of international commercial contracts, *Lex Mercatoria*, and cross-border contract provision under national law.

Arbitral tribunals have interpreted general principles of the CISG and *Lex Mercatoria* in disputes in various ways. In this article I analyzed three cases on penalty clause issue. In all cases tribunals found that penalty clauses falls outside of the CISG. However, one tribunal applied the idea of international interpretation stating that the issue shall be covered by common practices of international sale and thus the UNIDROIT Principles were found applicable. The tribunal found that even there was no provision for penalty clauses the issue was not automatically falling under the domestic law. Tribunal's ruling followed Art. 7(2) of the CISG which states that only if there are no general principles applicable at all national law shall apply.

Tribunals also found that general principles of the CISG are applicable even if the CISG is not. It follows Art. 7(2) logic to promote international standard to cross-border contracts where the closes connection is international commercial practice rather than any national jurisdiction.

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<sup>51</sup> Magnus 2012, at 162.



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